IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NO. 82-1205

DR. GRANVILLE M. SAWYER, ET AL.,
Petitioners

v.

IRANIAN STUDENT ASSOCIATION,
PEREYDOUN KIANI-ZEINABAD,
Individually and on Behalf of All
Others Similarly Situated,
Respondents

**On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit**

RESPONDENTS' BRIEF IN OPPOSITION

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I.

INTRODUCTION

The Respondents, IRANIAN STUDENT ASSOCIATION and PEREYDOUN KIANI-ZEINABAD, respectfully request that this Court deny the Petition for Writ of Certiorari invoked pursuant to 28 U.S.C. § 1254(1), seeking review of the Fifth Circuit's opinion in this case.

That opinion is styled *Iranian Student Association, Pereydoun Kiani-Zeinabad, individually and on behalf of all others similarly situated v. Dr. Granville M. Sawyer, et al.*, No. 81-2458 and was decided on September 13, 1982 (unpublished).

II.

HISTORY OF LITIGATION

The Respondents/Plaintiffs (hereinafter sometimes "Plaintiffs") filed this action on October 26, 1978, in the United States District Court for the Southern District of Texas, Houston Division, to challenge Petitioners/Defendants' (hereinafter sometimes "Defendants") indefinite campus-wide ban on various activities protected by the First Amendment to the United States Constitution. The District Court did not grant Plaintiffs' ex parte Application for a Temporary Restraining Order, but scheduled a hearing on that Application for the following week.

On October 27, 1978, however, Plaintiffs' attorneys met with representatives and counsel for the Defendant University. Following that discussion, Defendant Sawyer issued a Memorandum cancelling the ban. The parties subsequently agreed that Plaintiffs' claims for injunctive and declaratory relief had become moot and applied for attorney's fees under 28 U.S.C. § 1988.

On April 30, 1979, the District Court issued its Order finding that Plaintiffs were the "prevailing party." On August 10, 1979, the Court awarded Plaintiffs attorney's fees of $4,181.25 including costs, and dismissed the case.

Defendants thereupon appealed the award of attorney's fees to the United States Fifth Circuit Court of Appeals contending that the District Court's refusal to hold a

formal evidentiary hearing, on the issue whether Plaintiffs were the "prevailing party," had denied them the opportunity to show that Plaintiffs' lawsuit was not a "catalytic factor" in Defendants' decision to withdraw the ban.

After briefing and argument, that Court vacated the judgment of the District Court and remanded the case for an evidentiary hearing on the limited question of "whether [Plaintiffs'] lawsuit was a significant catalyst to the recision of the ban." *Iranian Student Ass'n v. Sawyer*, 639 F.2d 1160, 1164 (5th Cir. 1981).

This hearing was held on August 4 and 5, 1981. On August 25, 1981, the Court issued Findings of Fact and Conclusions of Law, holding that the Plaintiffs were indeed the prevailing party and again awarded Plaintiffs attorney's fees and expenses. After additional motions and briefing, the District Court on October 16, 1981, entered its Final Judgment.

The Defendants then appealed a second time. The two issues raised on appeal were (1) whether the District Court erred in finding that the Plaintiffs were prevailing parties for purposes of an attorney's fee award, and (2) whether the findings of the District Court were clearly erroneous in finding that the attorney's fees were not grossly excessive. The Circuit Court found no error in the District Court's determination that the Plaintiffs are the prevailing party. They based this on a two-prong test:

> "The first requirement is a purely factual determination—whether the plaintiff's lawsuit is a substantial factor or significant catalyst in achieving the desired results (citations omitted) . . . The second re-

> quirement is a legal determination . . . whether the defendant's action in voluntarily meeting the demands of the plaintiffs is the result of a 'frivolous, unreasonable, or groundless' lawsuit."

The Court found that the District Court's decision was not clearly erroneous and upheld the decision to award the attorney's fees. It further found that the attorney's fees awarded were not unreasonable. It, therefore, affirmed the District Court's decision.

On January 7, 1983, the Defendants petitioned for a Writ of Certiorari. The Plaintiffs herein respond in opposition.

III.

REASONS WHY THE WRIT SHOULD BE DENIED

Defendants advance several reasons why they believe the Writ of Certiorari should be granted in the cause *sub judice*. They do not, however, document a conflict between the decision below and that rendered by this Court or any other federal or state tribunal. Rather, one purported reason involves no more than a request that this Court review the findings of facts concurred in by both courts below. The other reasons raise no substantive issues which have not been precluded by the prior decisions of this Court.

A.

Relitigation of Fact Issues

Petitioner seeks review of "Concurrent Findings of Facts." As long ago as 1923 this Court defined the factors which make up its discretionary asumption of

jurisdiction as excluding review of errors in the findings of fact of the lower courts. *Magnum Comp. v. Coty*, 262 U.S. 159, 163 (1923).

The Defendants argue that the Court below "issued its decision without any consideration as to whether the Plaintiffs would prevail if the Defendants were permitted to offer a legal defense of their actions." (Petition for Writ, p. 4.) Although they state that they are contesting the lower Court's decision that "a civil rights plaintiff is a 'prevailing party' under 42 U.S.C. § 1988 where (1) some interlocutory relief has been achieved even if not legally proper and (2) the case filed is not 'frivolous,' " (Petition for Writ, p. 4) they are actually contesting the evidentiary findings of the District Court.

The Petitioners contend that they repeatedly asked that the District Court allow them the opportunity to offer evidence that they felt would suport their positions (Petition for Writ, p. 5). In actuality, they were allowed to put on evidence at the hearing as to the on-campus protest march and subsequent disturbances, which they now allege were excluded. There was evidence from the President of the University, Dr. Sawyer, and others as to the alleged danger of violence and disruption on campus. (Petition for Writ, p. A-14 - A-20). What the Petitioners are actually requesting is the right to offer more evidence on this issue.[1]

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1. It is true that the District Court did limit the testimony to the question of whether there was sufficient justification for the Plaintiffs' cause of action to render the bringing of the action non-frivolous. However, a review of the Defendants' offer of proof demonstrates that the evidence they were precluded from introducing was merely cumulative of the testimony actually provided. A wrongful exclusion of cumulative evidence does not authorize a reversal. *Schneider v. Lockheed Aircraft Corp.*, 658 F.2d 835 (D.C. Cir. 1981) *cert. denied* ____U.S.____, 102 S.Ct. 1622.

In the body of their argument, the Defendants as much as acknowledge that their complaint is directed to the District Court's findings. In light of the subsequent affirmance by the Fifth Circuit, such an argument does not rise to the level appropriate for the exercise of this Court's certiorari jurisdiction. The question here is similar to that in *Berenyi v. District Director, Imm. and Nat. Serv.*, 385 U.S. 630 (1967) where this Court held that:

> The Petitioner asks us to reject as "clearly erroneous" the fact conclusion . . . reached by the District Judge and accepted by the Court of Appeals. In order to do so, we would be forced to disregard this Court's repeated pronouncements that it "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." (Citations omitted.)

Berenyi v. District Director, Imm. and Nat. Serv., 385 U.S. at 635. No obvious or exceptional showing of error having been made, the Defendants' application should be denied. *Branti v. Finkel*, 445 U.S. 507, 512 n. 6 (1980).

B.

The Award is Not An Illegally Severe Financial Penalty

Next, Petitioners assert that the award of attorney's fees inflict "severe financial penalties." (Petition for Writ, p. 5.) They contend that the exposure of any party to such penalties, "when mootness deprives a party of a judicial determination of a lawsuit's meritoriousness" should only result from a clear authorization by Congress or by settled precedent. (Petition for Writ, p. 5.) The Petitioners cite as authority the dissent from denial of certiorari in *Alioto v. Williams*, 450 U.S. 1012 (1981).

> "To treat respondents as 'prevailing parties' under § 1988 because they secured a preliminary injunction is to ignore the fact that petitioners exercised their right to appeal the entry of that order and the fact that the propriety of the injunction was being challenged on appeal at the time the case became moot."

Alioto, 450 U.S. at 1012.

The dissent expressed concern that under the *Alioto* rationale no court would be authorized to review the actions taken by a District Judge which ultimately resulted in a Plaintiff being declared the prevailing party. That concern is not present in this case.

Congress has indicated that the Court's power to award fees is not conditioned on full litigation of the issues or a judicial determination that the Plaintiffs' rights have been violated. *Doe v. Marshall*, 622 F.2d 118 (5th Cir. 1980). Instead, as the legislative history of the act makes clear, a plaintiff need only prevail "on an important matter in the course of the litigation, even when he ultimately does not prevail on all issues." Attorney's Fees Award Act, S.R. 94-1011, 94th Cong., 2d Sess. 5, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5912-13, reprinted by the Subcommittee On Constitutional Rights of the Committee On The Judiciary, United States Senate, *Source Book: Legislative History, Texts, and Other Documents* at p. 11. (Hereinafter *"Source Book"*).

Such cases as *Kopet v. Esquire Realty Co.*, 523 F.2d 1005 (2nd Cir. 1975) and *Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3rd Cir. 1970), *cert. denied*, 401 U.S. 911 (1971) [both cited as the appropriate standard in the legislative history (*Source Book*, at 11)] make clear that Plaintiffs must be considered to have prevailed

when they vindicate rights even without formally obtaining relief. This standard is well-established.

In *Brown v. Culpepper,* 559 F.2d 274 (5th Cir. 1977), the Court held that a prevailing party should ordinarily recover attorney's fees unless specific circumstances would render such an award unjust. The Supreme Court has rejected the contention that, because the parties have settled their litigation by voluntary agreement, the Plaintiff is not a prevailing party. *Maher v. Gagne,* 448 U.S. 122, 130 (1980).

Even a case mooted by the voluntary actions of the Defendant will support a finding that the Plaintiff is a prevailing party. *See Robinson v. Kimbrough,* 652 F.2d 458 (5th Cir. 1981); *Harrington v. DeVito,* 656 F.2d 264 (7th Cir. 1981); *Gurule v. Wilson,* 635 F.2d 782 (10th Cir. 1980); *United Handicapped Federation v. Andre,* 622 F.2d 342 (8th Cir. 1980); *Nadeau v. Helgemoe,* 581 F.2d 275 (1st Cir. 1978).

A Plaintiff is considered to have prevailed on a moot claim where his lawsuit has acted as a "catalyst" in prompting the result. The legislative history of § 1988 requires this result. *Source Book* at p. 11 (Senate Report) and 215 (House Report). A case cited in this section of the legislative history illustrate the types of situations in which a Plaintiff can be found to have prevailed. *Thomas v. Honeybrook Mines, Inc.,* 428 F.2d 981 (3rd Cir. 1970), *cert. denied,* 401 U.S. 911, involved Plaintiff-Intervenors who won nothing in their litigation capacities but who were nonetheless entitled to fees for having caused the named Plaintiffs to file lawsuits which resulted in a common fund recovery benefitting the Plaintiffs and the Intervenors.

The standard in the Fifth Circuit, as found by the panel on the first appeal of this case, requires that Defendants be given an opportunity for a full evidentiary hearing on the merits of the prevailing party question. *Iranian Student Ass'n v. Sawyer,* 639 F.2d 1160, 1163-64 (5th Cir. 1981).

The Petitioners were indeed given such a hearing. Evidence was adduced at a two-day trial and thereafter the District Court made a specific finding, based upon the evidence presented, that Plaintiffs' cause was a substantial and motivating factor in the Defendants' decision to withdraw the ban on demonstrations and other First Amendment activity. Thereafter, the determination was appealed to the Fifth Circuit which, after review, affirmed by written opinion. Thus, this is not a case where the Petitioners have been denied a hearing.

Petitioners also contend that no party should be exposed to such penalties without a clear authorization by Congress. But Congress in 42 U.S.C. § 1988 specifically granted attorney's fees as costs. [The legislature had the option of making fees a question of damages, but specifically denominated them as costs.] Consequently, the congressional authorization is clear.

The power of Congress to legislate in this area cannot successfully be challenged. *Hutto v. Finney,* 437 U.S. 678 (1978). The necessary and proper clause of the Constitution, art. 1, § 8, Cl. 18, "authorizes Congress 'to exercise its best judgment in the selection of measures, to carry into execution the constitutional powers of the government,' . . . and 'avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances,' " *Buttrey v. United States,* 690 F.2d 1186, 1189

(5th Cir. 1982) [citing *Atkins v. United States*, 556 F.2d 1028, 1061 (Ct. Cl. 1977) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 415-20 (1819)]. No argument is advanced that the legislature has gone beyond its powers as set out in this authorization.

C.

Petitioners Claim That The Fifth Circuit's Opinion Is In Conflict With the Supreme Court

The Petitioners claim that the decision of the Court below "that a prevailing party is one who achieves an interlocutory victory[2] combined with a now-frivolous cause of action" is in conflict with *Hanrahan v. Hampton*, 446 U.S. 754 (1980). The Petitioners analyze *Hanrahan* as holding attorney's fees are only proper when a party has established his entitlement to some relief on the merits of his claims and only when a party has prevailed on the merits of at least some of his claims.

This is a misreading of its facts and conclusions. In *Hanrahan* the Supreme Court held that the Plaintiffs were not a "prevailing party" on appeal notwithstanding that they secured reversal of a directed verdict and obtained certain other relief. The Court found that all the Plaintiffs had won was that which they would have been granted if they had defeated the Defendants' Motion for a Directed Verdict in the trial court. *Hanrahan v. Hampton*, 446 U.S. at 758-9.

In essence, what the Defendants have attempted to do is invert the logic of *Hanrahan* to support a conclusion

2. As we have seen, this matter does not involve an interlocutory decision within the fair meaning of that term.

directly contrary to its thrust. That case specifically holds only that evidentiary rulings will not support an immediate claim that the moving party has "prevailed" within the meaning of 42 U.S.C. § 1988. The Defendant, on the other hand, argues that the failure to prevail on an evidentiary ruling must deny Plaintiffs' attorney's fees even though the work performed was necessary for Plaintiffs to ultimately prevail.

For this proposition the Defendants do not cite a single authority from the Supreme Court nor do they set forth any contrary circuit court opinion. Such a conclusion would be directly contrary to the legislative history of the act which specifies that the purposes behind the statute are remedial in nature and designed to encourage enforcement of constitutional rights by private attorneys. *Source Book* at p. 9. This is clearly not the intent behind the act. *See, e.g., Jones v. Diamond,* 636 F.2d 1364, 1381 (5th Cir. 1981).

Since the Defendants have failed to comply with the Supreme Court's Rule 19 which generally limits review to opinions which conflict with those of other courts of appeals or with that of the Supreme Court (on an important federal question) it is clear that the Defendants have not cited sufficient reason for this Court to exercise its discretionary jurisdiction.

D.

Federalism Does Not Preclude The Award of Attorney's Fees

Finally, in an addendum the Petitioners put forth a "Federalism" argument. Their argument, ostensibly taken

from a Supreme Court decision, *Younger v. Harris,* 401 U.S. 37 (1971) is that "Our Federalism" constitutionally prohibits the federal government, by the enacting of 42 U.S.C. § 1988 and by judicial interpretation, from exacting money from the states without a showing of "culpability." Petition for Writ, p. 7.

This argument is advanced for the first time on this Petition for Writ. It was not at issue below. As is well recognized, this Court's prudential rule is to generally refuse to address issues first appearing in a Petition. *Delta Airlines v. August,* 450 U.S. 346 (1981); *U. S. v. Ortiz,* 442 U.S. 891 (1975); and *Neely v. Martin Koeby Const. Co.,* 386 U.S. 312 (1967).

More importantly, the Petitioners' argument appears to be that this opinion limits congressional power to enact civil liberties legislation. The Supreme Court, in *Younger,* simply held that a federal plaintiff, even if prosecuted (criminally or otherwise) under an unconstitutional state statute, was not entitled to federal court equitable relief during the pendency of a state court prosecution. *Younger v. Harris, supra.* Thus, *Younger* holds no authority for the proposition advanced by the Petitioners.

While *Younger's* theoretical underpinnings are somewhat murky, the reasons for its policy of judicial restraint have been identified. These reasons revolve primarily around the functional identity of the federal judicial system and its judge-made role, if any, in supervising state court prosecution. *Younger* does, however, make quite clear that the Supreme Court presumes that the will of Congress in the area occupied by *Younger* would override notions of "comity" and "federalism."

> Since the beginning of this country's history Congress has, subject to few exceptions, manifested the desire to permit state courts to try state cases free from interference by federal courts. . . . a comparison of [congressional acts] graphically illustrates how few and minor have been the exceptions granted from the flat, prohibitory language of [such acts].

Younger v. Harris, 401 U.S. at 43.

Of course, if Congress has the power to override *Younger's* policy of judicial restraint, then *Younger's* rationale can hardly be claimed to deprive Congress of the power to legislate generally.

Thirdly, even if *Younger* could be stretched to support a general bar to federal actions in relationship to the state, it cannot preclude Congress from successfully enacting 42 U.S.C. § 1988.

In some contexts the Supreme Court has limited congressional power to enact legislation affecting intimate functions of the states. *See, e.g., National League of Cities v. Usery,* 426 U.S. 833 (1976). However, *Usery* has no impact over congressional enactments made pursuant to § 5 of the 14th Amendment. That amendment, as to evils it is designed to remedy, is inconsistent with the existence of dual sovereignty. The states, by ratifying it, have waived their general right against preemption of their powers where the exercise of such powers violates the constitution or laws of the United States.

> In [§ 5 of the 14th Amendment] Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the 14th Amendment, which themselves embody significant limitations on state authority. When Congress acts

> pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a congressional amendment whose other sections by their own terms embody limitations of state authority.

Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). *See also Katzenback v. Morgan*, 384 U.S. 641, 651 n. 10 (1966).

Since 42 U.S.C. § 1988 was enacted as an exercise of the powers granted Congress by § 5, [*see Hutto v. Finney*, 437 U.S. 678 (1978)], traditional notions of federalism are non-applicable. In this context, the argument that Congress cannot establish a standard, to use the Defendants' phrase, of "adjudicated fault" has no relevance.

IV.

CONCLUSION

For the foregoing reasons, Respondents suggest that the Petition for Writ of Certiorari to the United States Supreme Court should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned attorney, hereby certify that the above and foregoing Respondents' Brief in Opposition was mailed, first-class mail, postage pre-paid, to Ms. Laura S. Martin, Assistant Attorney General, State of Texas, Courts Building, P. O. Box 12548, Capitol Station, Austin, Texas 78711, on this the _____ day of February, 1983.

J. PATRICK WISEMAN